Supreme Court, U.S.
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No. 93-968

In the Supreme Court of the United States

OCTOBER TERM, 1993

ALBERT IVERSON,

Petitioner,

v.

GARY WEEKS, in his official capacity as the Administrator of THE OREGON DEPARTMENT OF INSURANCE AND FINANCE, SARA HARMON, in her official capacity as the Administrator of the WORKERS' COMPENSATION DIVISION, LIBERTY NORTHWEST INSURANCE COMPANY, an Oregon corporation,

Respondents.

On Petition for Writ of Certiorari to the Oregon Supreme Court

BRIEF IN OPPOSITION FOR RESPONDENTS WEEKS and HARMON

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QUESTIONS PRESENTED

Assuming the lower courts had decided petitioner's federal constitutional claim, the questions presented would be:

Under a regulated state workers' compensation system, does the action of a private insurance company in terminating workers' compensation benefits to an individual constitute "state action," such that the private insurer is required under the Due Process Clause to provide the individual with pre-termination notice and an opportunity to be heard?

When the State regulates the provision of, but does not directly provide, workers' compensation benefits to injured workers, is it required under the Due Process Clause to mandate that participating private insurance companies provide notice and an opportunity to be heard to individuals receiving workers' compensation benefits before private insurers may terminate the benefits?

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STATEMENT OF THE CASE

Respondents Weeks and Harmon generally accept petitioner's statement of the case, except as set forth below.

Petitioner sustained a knee injury on the job on December 6, 1990. Respondent Liberty Northwest Insurance Company accepted petitioner's workers' compensation claim on August 23, 1991, and petitioner began receiving "time loss" benefits. On October 8, 1991, Liberty Northwest, in a letter to petitioner, informed petitioner that it was denying further responsibility on

petitioner's knee injury claim. Liberty Northwest then discontinued payment of petitioner's time loss benefits.

Petitioner filed a claim with the hearings referee of the Oregon Workers' Compensation Board seeking an order directing Liberty Northwest to resume payment of time loss benefits and payment of the time loss benefits that petitioner claimed Liberty Northwest should have paid from October 8th forward. On May 29, 1992, the referee ordered Liberty Northwest to resume paying time loss benefits and, starting on that date, petitioner again began receiving those benefits. The referee also ordered Liberty Northwest to pay the time loss benefits for the period of October 8, 1991 to May 29, 1992. However, because Liberty Northwest sought review of the referee's decision before the Workers' Compensation Board, and then appealed the board's decision to the Oregon Court of Appeals, the portion of the order requiring repayment of the suspended time loss benefits was stayed.

On February 10, 1992, while the identical claim was pending before the hearings referee, petitioner filed a complaint in the circuit court asking that respondent Liberty Northwest be ordered to resume payment of time loss benefits and to repay suspended time loss benefits. Petitioner's complaint also asked that the court order respondents Weeks and Harmon to

> [a]fford plaintiff an opportunity to be heard, by way of full evidentiary hearing, on the issue of compensability before termination of temporary total disability benefits;
>
> [s]uspend enforcement of regulations and statutes authorizing unilateral termination of temporary total disability benefits without notice to claimant or an opportunity to be heard.

Respondents Weeks and Harmon moved to dismiss petitioner's complaint, arguing, *inter alia*, that under Oregon law, the

circuit court lacked subject matter jurisdiction of the complaint because exclusive jurisdiction to resolve the question whether Liberty Northwest properly terminated petitioner's time loss benefits resided with the Oregon Workers' Compensation Board.[1]

The circuit court entered its order granting respondents' motion to dismiss on June 4, 1992. The order recited

> that the first motion of defendants Weeks and Harmon to dismiss for lack of subject matter jurisdiction over plaintiff's workers' compensation claim is allowed; and it is
>
> FURTHER ORDERED that the remaining motions filed by defendants Weeks and Harmon are moot.

The judgment of dismissal was entered on September 22, 1992.[2]

REASONS FOR DENYING REVIEW

Petitioner claims that the courts below "decided a federal question in a way that conflicts with the decision of another state court of last resort, or of a Federal Court of Appeals." Pet. Cert. 8. He further claims that the courts below "decided an important question of federal law." *Id.* At page ii, petitioner asserts:

> * * * the Oregon Circuit Court dismissed Mr. Iverson's complaint, agreeing with Defendants' arguments that the post termination procedures provided by the State of Oregon were constitutionally adequate.

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[1]Respondents Weeks and Harmon also moved to dismiss the complaint on the basis that the complaint failed to state a claim entitling plaintiff to relief. Respondents argued that the facts pleaded in the complaint gave rise to no constitutional obligation on respondents' part to require private insurers to provide notice and an opportunity to be heard before terminating benefits.

[2]This chronology clearly shows that petitioner is wrong in his assertion, Pet. Cert. at 6, that the circuit court dismissed plaintiff's complaint on jurisdictional grounds before the referee had issued his decision.

At page iii, petitioner further asserts:

> In refusing to review this matter, the Oregon Supreme Court has held that the State of Oregon is not required by the due process clause of the Fifth and Fourteenth Amendments to provide recipients of Workers' Compensation time loss benefits notice and opportunity for a hearing prior to the termination of their benefits.

Petitioner misrepresents the nature of the issue the courts decided below. As is clear from the circuit court's judgment, Pet. Cert. App. F1-2, the trial court decided no federal question because it did not reach the merits of petitioner's due process contention. Rather, the circuit court dismissed the complaint "for lack of subject matter jurisdiction over plaintiff's workers' compensation claim." *See also* Pet. Cert. App. E1-2 (order granting respondent Liberty Northwest's motion "to dismiss the plaintiff's complaint for lack of subject matter jurisdiction.")

Nor did the appellate courts decide a federal question. Petitioner's first assignment of error in his brief in the Oregon Court of Appeals was that "[t]he trial court erred in holding that the court lacked subject matter jurisdiction over the cause of action stated in plaintiff's complaint." Petitioner's Brief and Abstract of Record, p. 5 (filed in the Oregon Court of Appeals). The Oregon Court of Appeals affirmed the trial court's judgment without opinion, thereby rejecting petitioner's subject matter jurisdiction argument. The Oregon Supreme Court denied review without opinion. Pet. Cert. App. C-1; A-1. Necessarily, then, the Oregon circuit court and the Oregon appellate courts did not reach the merits of petitioner's constitutional challenge, which the circuit court had deemed moot in light of its dismissal of petitioner's complaint on jurisdictional grounds.

Whether the Oregon circuit court had subject matter jurisdiction to entertain petitioner's constitutional challenge is purely a question of state law. Petitioner attempted to invoke Or. Rev. Stat. § 183.490, a generic statutory mandamus proceeding by which a party may ask a court to compel an agency to act where it has unlawfully failed or refused to act. However, in matters pertaining to workers' compensation, Oregon courts routinely have held that the remedies provided under the workers' compensation statutes are exclusive of all other remedies. *See, e.g., SAIF v. Johnson*, 99 Or. App. 64, 67, 781 P.2d 374 (1989), *rev. denied*, 309 Or. 334 (1990) (stating that the court "repeatedly [has] held that the circuit courts lack jurisdiction to consider matters concerning workers' compensation claims and that the decisional and review provisions of the Workers' Compensation Law are exclusive [citing cases]."). Respondents Weeks and Harmon argued below that under this line of cases, petitioner could not maintain an action against them under Or. Rev. Stat. § 183.490. The circuit court agreed and dismissed the complaint; the appellate courts affirmed.

Petitioner makes no attempt to argue that the lower courts were wrong in concluding that petitioner's action was cognizable under Oregon's workers' compensation statutes. Under petitioner's theory of "state action," respondent Liberty Northwest is a state actor because the workers' compensation system in Oregon is heavily regulated at the state level, and all private insurance companies such as Liberty Northwest effectively act as agents of the State for state action purposes.[3] Assuming petitioner were

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[3]The arguments presented in the petition for writ of certiorari are less than sharp and precise. However, in his petition for review to the Oregon Supreme Court, petitioner made his position on this point clear:

(continued...)

correct in this novel proposition, petitioner could have argued before the workers' compensation hearings referee that Liberty Northwest's termination of his time loss benefits without prior notice and an opportunity for a pre-termination hearing violated due process. Had the referee agreed with petitioner, petitioner would have been entitled to repayment of the withheld benefits. Petitioner's constitutional claim clearly involves a matter concerning a workers' compensation claim over which the workers' compensation system, not the state circuit courts, have exclusive jurisdiction in the first instance.[4]

Even if petitioner were correct on the purely state law question of which forum he must use to present his claim, it does not follow that the issue has sufficient importance to merit granting certiorari. As of April, 1993, petitioner had been repaid the eight months of suspended time loss benefits. Pet. Cert. 16. Were this Court to conclude that the lower courts erred in dismissing petitioner's complaint, the appropriate result would be to remand this matter to the state courts to consider petitioner's constitutional claim in the first instance. The state circuit court, however, would have no choice but to dismiss petitioner's complaint as moot. Oregon courts adhere strictly to the requirement that, to be justiciable, a claim must involve a live controversy. Oregon does not recognize any exceptions, such as claims

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[3](...continued)

> The actions complained of in the action below, both of the State Defendants and of Liberty Northwest, were those provided for and established by State laws and regulations, and thus are state action for purposes of the complaint filed by Mr. Iverson.

Pet. Rev. 4.

[4]Judicial review of workers' compensation claim decisions is available in the Court of Appeals. Or. Rev. Stat. § 656.298.

that are capable of repetition yet evading review, or claims that, while not live, are of sufficient public importance that review nevertheless is warranted. *See, e.g., Hay v. Dept. of Transportation*, 301 Or. 129, 134, 719 P.2d 860 (1986) (rejecting contention that judicial review of a temporary rule that had expired is not moot because the agency might readopt the rule, and dismissing the rule challenge as moot); *State ex rel. Oregonian Publishing Co. v. Sams*, 298 Or. 329, 332, 692 P.2d 116 (1984) (noting "that this court has not in recent years accepted the view that it is a proper judicial function to render a legal opinion 'in the public interest' when there is no concrete underlying dispute to be decided.")

Finally, petitioner's "state action" claim is wholly without merit under this Court's line of precedents. Petitioner does not cite a single case from this or any other court that supports its claim that the action of a private insurance carrier denying or terminating benefits equals "state action" under the Due Process Clause. Nor does petitioner cite any authority for the proposition that State respondents Weeks and Harmon, acting in their official capacity, are constitutionally required to compel private insurance carriers that provide workers' compensation benefits to private individuals under a state-regulated workers' compensation program to give their insureds notice and an opportunity to be heard prior to the private insurance companies deciding to terminate benefits. Indeed, this Court's precedents are to the contrary. *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1975) (actions of a private utility are not subject to constitutional limitation even though the utility is extensively regulated by the State); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982) (actions of a private school are not subject to constitutional limitation even though the school is extensively regulated and

largely financed by the State); *Blum v. Yaretsky*, 457 U.S. 991 (1982) (actions of private nursing homes are not subject to constitutional limitation even though nursing homes are extensively regulated by the State, especially in regard to their Medicaid patients who were the plaintiffs).

CONCLUSION

Petitioner's petition for writ of certiorari fails to present a substantial federal question that was decided by the courts below. Accordingly, the Court should deny the petition.

Respectfully submitted,

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